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6 **UNITED STATES DISTRICT COURT**
7 **DISTRICT OF NEVADA**

8 UNITED STATES OF AMERICA, 3 :18-cr-00034-HDM-WGC
9
10 Plaintiff,
11 v. ORDER
12 CHRISTOPHER ALLEN TATOMER,
13
14 Defendant.
15

16 On April 11, 2018, an indictment was issued charging Defendant
17 with Receipt of Child Pornography under 18 U.S.C. § 2252A(a)(2)
18 and (b). (ECF No. 1). On January 16, 2019, Defendant filed a
19 motion to suppress evidence. (ECF No. 32). The Government
20 responded, (ECF No. 37), and Defendant replied (ECF No. 38). For
21 the reasons set forth below, the motion is denied.

22 **I. BACKGROUND**

23 The Affidavit of FBI Task Force Officer Gregory Sawyer, which
24 was attached to the Application for Search Warrant, sets forth the
25 following relevant facts:

26 **DETAILS OF THE INVESTIGATION**

27 23. Pursuant to 18 U.S.C. § 2258A, Electronic Service
28 Providers are required to report incidents of child

1 pornography to the National Center for Missing and
2 Exploited Children (NCMEC) through the "CyberTipline."
3

4 24. The National Center for Missing and Exploited
5 Children complies the information from the ESP then
6 forwards the reported information to law enforcement
7 operating in the area where the activity is believed to
8 be occurring or originated from. This report is called
9 a "CyberTip."
10

11 25. On July 17, 2017, Skype submitted a report to the
12 National Center for Missing and Exploited Children
13 regarding child pornography images that had been
14 uploaded to their service. Two child pornography images
15 were uploaded to the Skype account screen name
16 "mayorcock." Skype identified the person using their
17 service by the IP address used to login to the account
18 71.94.0.182.

19 26. An example of a child pornography file uploaded to
20 the Skype service is as follows:
21

22 a) File Name: 22c32a2f-1e8b-494c-a4d4-3b64866d07a8.jpg
23

24 Description: This is a picture file showing a
25 completely nude boy who appears to be approximately 13-
26 16 years of age. The boy is in what appears to be a
27 bathroom, has his arms raised over his head, and has an
errection.

28 b) File Name: 9cced867d-1d14-45f9-903a-abf598e24057.png
29

30 Description: This is a picture file showing a
31 completely nude young girl and adult male. The young
32 girl is approximately 4-7 years of age and is laying
33 down on a blanket with her hands behind her head. The
34 adult male is straddling the young girls' chest and has
35 one hand on his penis while the young girl performs
36 fellatio on him. The adult male has his other hand on
37 the young girls' vagina.

38 27. On or about March 2017 Sergeant Dennis Carry of the
39 Washoe County Sheriff's Office engaged in undercover
40 webchats using an undisclosed service targeting
41 individuals exploiting children in the Northern Nevada
42 region. One of those chats was with a person who
43 identified himself as Chris Tatomer. During one of the
44 conversations the person identifying himself as Chris
45

1 Tatomer suggested moving the conversation over to Kik or
2 Skype. Both of those services are commonly used by
offenders seeking child pornography.

3 **28. THE SUBJECT OF THIS SEARCH WARRANT**

4 IP Address: 71.94.0.182
5 Skype Username: mayorcock
6 Subject: Chris Tatomer
7 Service Address: 5736 Sidehill Drive, Sparks,
 Nevada

8 29. On August 30, 2017, an Administrative Subpoena was
served upon Charter Communications requesting subscriber
information and IP logs for the IP address 71.94.0.182.
9

10 30. Charter Communications responded to the
11 Administrative Subpoena and provided the following
information:
12

13 Account holder: James Tatomer
14 Service address: 5736 Sidehill Drive, Sparks,
 Nevada

15 31. A check of the Nevada Department of Motor Vehicles
shows Chris Tatomer claims 5736 Sidehill Drive, Sparks,
Nevada as his address on his Nevada Drivers Licenses.
16

17 (ECF No. 32-1 at 14-16).

18 Based upon the information included in the Application for
19 Search Warrant, the Magistrate Judge issued a search warrant on
20 January 16, 2018. (See ECF No. 32-1, 32-2).

21 **II. ANALYSIS**

22 In his motion, Defendant first argues that, (1) the warrant
23 depended on a warrantless and illegal search by a state actor,
24 NCMEC, and (2) the search warrant affidavit was based upon stale
25 information that was not independently corroborated by law
26 enforcement, and therefore, fruits of the warrant should be
27 suppressed. (ECF No. 32). Each argument is discussed in turn.
28

1 **A. IS NCMEC A STATE ACTOR, AND IF SO, DID IT PERFORM A**
2 **SEARCH WITHIN THE MEANING OF THE FOURTH AMENDMENT?**

3 The Fourth Amendment provides that "[t]he right of the people
4 to be secure in their persons, houses, papers, and effects, against
5 unreasonable searches and seizures shall not be violated."
6 U.S.CONST.AMEND.IV. The Fourth Amendment's proscriptions on
7 searches and seizures are inapplicable to private action." *United*
8 *States. v. Tosti*, 733 F.3d 816, 821 (9th Cir. 2013) (citing *United*
9 *States v. Jacobsen*, 466 U.S. 109, 113-14 (1984)).

10 The Defendant asserts that NCMEC is a state actor and cites
11 to the Tenth Circuit case, *United States v. Ackerman*, in support
12 of his position. 831 F.3d 1292, 1297 (10th Cir. 2016). The
13 defendant therefore contends that a warrant was required to conduct
14 the search. The court finds and concludes that even if NCMEC were
15 considered to be a state actor, under the facts of this case it
16 did not perform a search within the meaning of the Fourth
17 Amendment.

18 In *Ackerman*, AOL identified one of four images attached to
19 the defendant's emails as containing child pornography. AOL
20 forwarded the email and all four of the images to NCMEC, which
21 opened the email and all the attached images. NCMEC then alerted
22 law enforcement about the presence of child pornography, as
23 required by statute.¹ The court held that NCMEC was acting as a

24 ¹ 18 U.S.C. § 2258A(a) mandates that Internet service providers
25 that obtain actual knowledge of any facts or circumstances evincing
26 apparent child pornography violations must submit, as soon as
27 reasonably possible, reports to the CyberTipline. NCMEC is then
28 required to forward each report it receives to law enforcement
 agencies. See *id.* § 2258A(c).

1 government agent and expanded on the private search when it opened
2 the three unidentified attachments because these items could have
3 disclosed information that was "previously unknown to the
4 government." 831 F.3d at 1301-04, 1306.

5 "Once frustration of the original expectation of privacy
6 occurs, the Fourth Amendment does not prohibit governmental use of
7 the now-nonprivate information." *Tosti*, 733 F.3d at 821 (citing
8 *Jacobsen*, 466 U.S. at 117). Any "additional invasions of... privacy
9 by the government agent must be tested by the degree to which they
10 exceed[] the scope of the private search." *Id.* (quoting *Jacobsen*,
11 466 U.S. at 115).

12 In *Tosti*, the Ninth Circuit concluded that no search had
13 occurred within the meaning of the Fourth Amendment, where the
14 government detectives' searches of child pornography on the
15 defendant's computer derived from a private party's original
16 search. *Tosti*, 733 F.3d at 821. The court held that the
17 detectives' warrantless viewing of the photographs did not trigger
18 the Fourth Amendment because the private employee's "prior viewing
19 of the images had extinguished [the defendant's] reasonable
20 expectation of privacy in them" and the detectives had viewed only
21 the photographs that the private employee had already viewed. *Id.*
22 at 821-822.

23 In the case at bar, Skype, a private party, is the entity
24 that performed the search. Skype subsequently reported the
25 uploading of child pornography to NCMEC, as is required by statute.
26 There is no evidence that NCMEC, or Detective Sawyer, expanded on
27

1 the scope of the search that had already been conducted by Skype.
2 Detective Sawyer and NCMEC reviewed only the photographs that the
3 private party, Skype, had already reviewed. Therefore as
4 distinguished from Ackerman and in line with the holding in *Tosti*,
5 the warrantless viewing of the images by NCMEC and Detective Sawyer
6 did not implicate the Fourth Amendment because the private entities
7 viewing of the images extinguished the defendant's reasonable
8 expectation of privacy. Therefore, the court does not, under the
9 facts of this case, decide whether NCMEC is a state actor because
10 NCMEC did not exceed the scope of the private search. Accordingly,
11 the court finds that neither NCMEC nor Detective Sawyer performed
12 a search within the meaning of the Fourth Amendment.

Defendant also argues that the information used to obtain the search warrant was stale, as approximately six months had passed from the time NCMEC received the CyberTip from Skype to the time the search warrant was sought. Defendant's argument that the information in the affidavit was stale is without merit.

An affidavit's facts must demonstrate the probability that, at the time the magistrate issues the warrant, the evidence that law enforcement officers seek will be present in the location they intend to search. *Durham v. United States*, 403 F.2d 190, 194 (9th Cir. 1968). "Information underlying a warrant is not stale 'if there is sufficient basis to believe, based on a continuing pattern or other good reasons, that the items to be seized are still on the premises.'" *United States v. Schesso*, 730 F.3d 1040, 1047

(9th Cir. 2013) (quoting *United States v. Lacy*, 119 F.3d 742, 745-46 (9th Cir. 1997)). "The mere lapse of substantial amounts of time is not controlling in a question of staleness." *United States v. Dozier*, 844 F.2d 701, 707 (9th Cir. 1988). Rather, courts "evaluate staleness in light of the particular facts of the case and the nature of the criminal activity and property sought." *United States v. Pitts*, 6 F.3d 1366, 1369 (9th Cir. 1993) (internal quotation marks omitted) (quoting *United States v. Greany*, 929 F.2d 523, 525 (9th Cir. 1991)).

In *Schesso*, law enforcement agents applied for a warrant to search the defendant's residence approximately 20 months after law enforcement officers confirmed that a child pornography video was made available. *Id.* at 1043. In holding that the information was not stale, the court cited the affidavit's statement that:

[I]ndividuals who possess, distribute, or trade in child pornography "rarely, if ever, dispose of sexually explicit images of children" because these images are treated as "prized possessions." In light of the "nature of the criminal activity and property sought" and the reasonable inference that [defendant] fit the profile of a collector, the state court judge had ample reason to believe that the eDonkey video or other digital child pornography files would be present at [defendant's] residence a mere 20 months after the eDonkey incident. *Id.* at 745 (citation omitted); see also *United States v. Allen*, 625 F.3d 830, 842-43 (5th Cir. 2010) (holding that an 18-month delay between when defendant sent child pornography images through a peer-to-peer networking site and issuance of a search warrant did not render the information stale); *United States v. Morales-Aldahondo*, 524 F.3d 115, 117-19 (1st Cir. 2008) (concluding that the passage of over three years since the acquisition of information that defendant's brother, who shared defendant's residence, had purchased access to various child pornography websites, did not render that information stale.).

730 F.3d at 1047. In *Lacy*, based on an affidavit similar to that of the one in *Schesso*, the Court found that a search performed ten months after the images were downloaded was not stale. *Lacy*, 119 F.3d at 746.

Here, Detective Sawyer's affidavit also contained statements about the characteristics of people who distribute, receive, or possess images of child pornography, including that these individuals collect images that "are often maintained for several years and may be kept close by, usually at the individual's residence, to enable the collector to view the collection, which is valued highly." (ECF No. 32-1 at 13). Further, the time lapse here was substantially less than in *Lacy*, 119 F.3d at 746 (10 months) or *Schesso*, 730 F.3d at 1047 (20 months).

Therefore, the court finds that the information used to obtain the search warrant was not stale and the Magistrate Judge had a substantial basis for determining that there was probable cause to issue the search warrant.

III. CONCLUSION

For the foregoing reasons, the Motion to Suppress Evidence (ECF No. 32) is **DENIED**.

IT IS SO ORDERED.

DATED: This 9th day of April, 2019.

Howard D McKibben

HOWARD D. MCKIBBEN
UNITED STATES DISTRICT JUDGE